

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOEL ALLEN MAZER,

Defendant-Appellant.

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UNPUBLISHED  
February 28, 2003

No. 236510  
Detroit Third Circuit  
LC No. 00-02365

Before: Saad, PJ, and Zahra and Schuette, JJ.

PER CURIAM.

The jury convicted defendant , as charged, of criminal sexual conduct in the fourth degree (force or coercion) contrary to MCL750.520(c)(1)(b). Defendant appeals as of right and we affirm.

**I. Facts and Proceedings**

This case stems from an incident that occurred between defendant and complainant on December 14, 1999, at the Sears Optical Center in the Westland Mall. At the time of the incident, defendant was an optometrist. Complainant was an eighteen year old female who went to the optical center because she was having problems with her contact lenses. Complainant testified that after a brief period in the waiting room, defendant escorted her into the examining room and told her to have a seat in the examining chair. While complainant was seated in the examination chair, defendant pulled a machine in front of her face and began changing the lenses in the machine. Complainant testified that she was seated with her knees together and her hands were resting just past her knees. Defendant sat in front of her in a chair with wheels, and as defendant was operating the machine and questioning her about which lenses allowed her better vision, complainant felt defendant place his penis in her hand.

Complainant immediately pulled back and defendant moved away and attempted to cover the front of his pants with his tie and lab coat. Complainant observed his underwear. Complainant watched as defendant left the room and noticed that he zipped up his pants. Complainant stated that she finished the appointment and that defendant gave her some new contact lenses. Complainant then drove over to her boyfriend's house and told him about the encounter. Later that evening, complainant told her mother what happened, and the next morning, her mother took her to the police to report the incident.

Prior to trial, the prosecutor filed a notice of intent to present evidence of other acts and defense counsel filed a motion and objected to the admission of this evidence. Specifically, defendant objected to the proposed testimony of four other young women, each of whom planned to testify to prior unwanted sexual touching or exposure on the part of defendant during the course of eye examinations. Defendant asserted that there was no similarity between this and the other instances with the four women and that such testimony would be more prejudicial than probative. The trial court denied defendant's motion and allowed the testimony of the women and reasoned that the evidence was offered for a proper purpose; i.e. to refute defendant's defense of impossibility and to show intent and/or preparation, or scheme, plan, or system.

A.S. testified that in 1986, when she was 26 years old, she went to an optical shop in Farmington to have her glasses replaced. A.S. sat down in front of a counter and handed defendant her glasses. Defendant walked into a small room out of A.S.' sight and then returned with a towel tucked in his pants over his genital area. Defendant stood in front of her doing some paperwork, then moved the towel aside, exposing his penis. A.S. testified that she was shocked and that she averted her gaze by looking through her purse and then paid defendant for her glasses. As she was leaving she told defendant, "Next time, zip it up." After she left, she drove to the police station and reported the incident.

C.L. testified that in 1994, when she was 22 years old, she went to the New Vision store in Livonia to get new contact lenses. C.L. went in to the examining room alone with defendant. Initially, C.L. noticed nothing unusual in their interaction. However, she found it somewhat unusual when defendant moved a machine directly in front of her face and began to flip the lenses, and he told her to drop her foot off a stool, so that her left leg was dangling off her chair. Defendant then pulled his stool up in front of C.L. so that he was straddling her right leg. C.L. then felt defendant's penis on the inside of her right thigh. She testified that defendant remained fully clothed, but that he was "moving in and out and adjusting [the machine]" and his penis was "like throbbing or twitching". After a few minutes, defendant slid back and C.L. left and went to the waiting room where she told her boyfriend about the incident. C.L.'s boyfriend went over to defendant and grabbed him and C.L. yelled for the receptionists to call the police because she feared her boyfriend would hurt defendant. The police arrived and C.L. told them what happened.

M.A. testified that in 1996, when she was 27 years old, she went to the Lens Crafters store in Troy to pick up some contacts. She went into an examining room with defendant. He pulled a chair up to where M.A. was seated and straddled her legs. She testified that she felt him pressing against her with his erect penis as he examined her. She left the office and the following day she reported the encounter to the police.

B.H. testified that in 1997 she went to the Sears optical store in Westland for an eye examination. During the course of the examination, defendant brushed against her knee cap with his erect penis. She left the examination without telling anyone of the incident. However, she read in the newspaper about the charges against defendant in the present case. She contacted the reporter who wrote the article, and the reporter advised her to call the police and report the incident. B.H. then reported the incident to police.

## II. Standards of Review

The admissibility of “bad acts” evidence is within the trial court’s discretion and will be reversed on appeal only when there has been a clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383 (1998). An abuse of discretion exists only when an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made. *People v Rice (On Remand)*, 235 Mich App 429, 439; 597 NW2d 843.

### III. Analysis

Defendant argues that the trial court erred in admitting evidence of other acts of sexual contact by defendant with four other female patients in the past because the 404(b) evidence is remote, and has little probative use. We disagree.

MRE 404(b) governs admission of evidence of bad acts. It provides:

(1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Except as allowed by MRE 404(b), use of bad acts as evidence of character is excluded to avoid the danger of conviction based on a defendant’s history of misconduct. *People v Starr*, 457 Mich 490, 495; 577 NW2d 673. To be admissible under MRE 404(b), bad acts evidence generally must satisfy three requirements: (1) it must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. A proper purpose is one other than establishing the defendant’s character to show his propensity to commit the offense. *VanderVliet, supra* at 74.

Here, the evidence was offered to show that defendant’s actions were not accidental, nor did the situation involve a mistaken interpretation of defendant’s actions by complainant. Defendant claimed in his opening statement that complainant was mistaken about what happened. During closing arguments defendant asserted that the encounter was physically impossible. The evidence presented had a tendency to prove that defendant’s conduct was not impossible nor accidental, but that he intended to touch complainant in a sexual way for purposes of sexual gratification. The evidence was not offered solely to show defendant’s bad character, but was offered to rebut defendant’s theory of the case; and was thus offered for a proper purpose.

Additionally, this evidence was relevant. Relevance is a relationship between the evidence and a material fact at issue that must be demonstrated by reasonable inferences that make a material fact at issue more probable or less probable than it would be without the evidence. *Crawford, supra* at 385. The logical relationship between the proffered evidence and the ultimate fact sought to be proven must be closely scrutinized. *Id.* The offered evidence truly must be probative of something other than the defendant’s propensity to commit the crime. *Id.* Under our rules of evidence, the trial court must make an individualized determination of relevance in each case and examine the prosecution’s theories of logical relevance. *People v Sabin* 463 Mich 43; 614 NW2d 888 (2000). Proof that defendant engaged in sexual activity

while he examined other female patients made it more probable that he acted in the manner as charged in this case.

Defendant's arguments that the other acts in question are too remote in time and are not similar enough to the present situation to be relevant are unconvincing. Evidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system. *Sabin, supra* at 43. Logical relevance is not limited to circumstances in which the charged and uncharged acts are part of a single continuing conception or plot. *Id.* In *Sabin*, our Supreme Court stated:

We acknowledge that the uncharged and charged acts were dissimilar in many respects. Defendant's stepdaughter testified that, over the course of seven or eight years beginning when she was in kindergarten, defendant performed oral sex on her three to seven times weekly. The abuse took place at night in her bedroom. She recalled one incident when she was in the fifth grade during which defendant had her lay on her side and he placed his penis between her legs. The charged act in this case, in contrast, was the only time defendant assaulted the complainant. The complainant did not allege prolonged sexual abuse. The incident occurred during a weekday afternoon, not at night while the complainant slept. The sexual act was intercourse, not oral sex. On the basis of this evidence, one could infer that the uncharged and charged acts involved different modes of acting, both in terms of sexual acts and the manner in which defendant allegedly perpetrated the abuse.

This case thus is one in which reasonable persons could disagree on whether the charged and uncharged acts contained sufficient common features to infer the existence of a common system used by defendant in committing the acts. As we have often observed, the trial court's decision on a close evidentiary question such as this one ordinarily cannot be an abuse of discretion. E.g., *People v Smith*, 456 Mich 543, 550, 581 NW2d 654 (1998). We therefore conclude that the trial court did not abuse its discretion in determining, under the circumstances of this case, that the evidence was admissible under this theory of logical relevance. *Id.* at 66-67

Similarly, here, the other acts admitted were not identical to the act charged; however, they did share important similarities. The other acts occurred with other young women who sought optical services. Even though they did not occur in the exact same office, or with the exact same sequence of events, the other acts indicate that defendant engaged in inappropriate and unwelcomed behavior of a sexual nature in the context of his examination of patients. Just as in *Sabin*, the other acts admitted in the case at bar could reasonably be viewed as containing common features to the act charged and their admission is not an abuse of discretion.

Finally, this evidence was not unfairly prejudicial. In determining that relevant evidence is admissible, the trial court must also consider whether to exclude the evidence under MRE 403. The trial court may exclude the admissible evidence of other acts "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading

the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403. The proffered evidence would be unfairly prejudicial if it presented a danger that marginally probative evidence would be given undue or preemptive weight by the jury. *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001). Here, the evidence of other acts admitted was highly probative of defendant's intent and therefore its probative value was not outweighed by the danger of unfair prejudice.

Affirmed.

/s/ Henry William Saad

/s/ Brian K. Zahra

/s/ Bill Schuette